MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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DOCKET FILE COPY ORIGINAL

October 4, 1999

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Docket Nos. 91-221 and 87-8: Response to Public Notice FCC 99-240 (Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules)

On behalf of the Minority Media and Telecommunications Council ("MMTC"), transmitted herewith are the original and four copies of our Comments.

Our Comments present a plan to break processing order ties, and promote diversity, by considering applicants' proposals to spin off television stations to socially and economically disadvantaged small businesses.

We respectfully request an opportunity to meet with Bureau officials, along with other affected parties, to explore the feasibility of our plan.

Respectfully submitted,

David Earl Honig
Executive Director

Enclosures

cc: Vicki Phillips
Chief, Legal Branch
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Processing Order for Applications	)	MM Docket Nos. 99-221
Filed Pursuant to the Commission's New	)	and 87-8
Local Broadcast Ownership Rules	)	(Response to Public
	)	Notice FCC 99-240)

TO THE COMMISSION

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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October 4, 1999

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SUMMARY

MMTC proposes that ties in a "race to the courthouse" among TV duopoly applicants be broken according to whether the mutually exclusive applicants propose to spin off full power television stations to socially and economically disadvantaged small business concerns ("SDBs").

Too much is at stake to miss this opportunity to promote diversity in a big way. This task is not a one-day excursion, but it is not insoluable by an agency accustomed to resolving stupefyingly cerebral issues of telephone rate regulation and broadcast engineering. By acting imaginatively, and avoiding the sloth that so often defaults communications policy into anti-diversity paradigms like lotteries, the Commission can cause millions of dollars in broadcast assets to become available to socially and economically disadvantaged small businesses. History should record that the Commission seized this opportunity to promote diversity, rejecting the notion that it was "too complicated" to design a procedure that helps these deserving businesses.

Bumping applications proposing spinoffs to the top of the processing line is simple, straightforward, and fair. A lottery benefits only the astrologically blessed, and it would not promote diversity. Rewarding the first courier camped out in front of the Portals would equate TV spectrum with rock concert ticket sales -- and it would not promote diversity. A bump-up for spinoffs is just as simple and far more rational than these methods. It is a workable, win-win incentive system to promote diversity.

MMTC respectfully invites the industry's comments, suggestions and support for its proposal.

* * * * *

The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in response to the Public Notice, FCC 99-240 (released September 9, 1999).[1/]

I. The Commission Has A Rare Opportunity To Promote Diversity Through Its Selection Of A Processing Method

Rarely is the Commission presented with an opportunity like this to promote diversity through the licensing process. The Commission has two choices:

It can award valuable license transfer opportunities to the astrologically blessed through a lottery system, as proposed in the Public Notice; or to those with the swiftest couriers through a first-come system, or through some other "neutral" procedure.

Or it can do the right thing: create a workable, win-win incentive for applicants to promote diversity. While a diversity promoting system cannot completely break all race-to-the-courthouse ties, it can break or help break many ties in a manner that is eminently straightforward and fair.

The Commission is faced with industry conditions that place ownership diversity at risk.[2/] Indeed, the Commission helped create

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1/ The views expressed in these Comments are the institutional views of MMTC, and do not necessarily reflect the individual views of each of its officers, directors or members.

2/ See Kofi Ofori, Karen Edwards, Vincent Thomas and John Flateau, Blackout? Media Ownership Concentration and the Future of Black Radio (1996) (documenting loss of minority ownership in the wake of the 1996 Telecommunications Act and the loss of the tax certificate policy). See also A. DeBarros, "Radio's Historic Change: Amid Consolidation, Fear of Loss of Diversity, Choice," USA Today, July 8, 1998, at 1A-2A.

those conditions.3/ Thus, the Commission should take steps to remedy the consequences of its former licensing decisions. Such steps are fully consistent with the Telecommunications Act, which requires the Commission to promote diversity however it can.4/

Few tools to promote diversity are currently available. The tax certificate policy and comparative hearing policies are gone. New licenses subject to being auctioned. Ascertainment, nonentertainment program reporting, and the Fairness Doctrine have disappeared. The spectrum is virtually full, with only low power TV and FM stations potentially available in urban areas. EEO

3/ The Commission was an active co-conspirator with state governments in two kinds of schemes to prevent minorities from obtaining the skills needed to enter the broadcasting field: (a) awarding broadcast licenses to de jure and de facto segregated institutions (such as the state-run Alabama Educational Television Commission, which was freely given all of the state's public TV licenses when George Wallace was Governor), and (b) failing to enable even ostensibly "separate but equal" minority state institutions to secure broadcast licenses. Although it knew that the exclusion of minorities from broadcast education denied minorities an opportunity to obtain broadcast experience or a past broadcast record, the FCC built these criteria into its comparative licensing policies anyway. The FCC did not repeal a related, overbroad financing rule until 1981. See Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision"), repealed in Financial Qualifications Standards, 87 FCC2d 200, 201 (1981). Finally, the Commission routinely granted and renewed licenses of commercial broadcasters that discriminated, and in doing so openly embraced state segregation laws even after Brown. See, e.g., Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955). The Commission continued these policies through the early 1970s, when it adopted (but thereafter seldom enforced) the EEO rule.

This history is set out in detail in the comments MMTC and 25 other civil rights organizations filed in the Low Power Radio proceeding, MM Docket No. 99-25 (Comments of Civil Rights Organizations, filed August 2, 1999) at 34-49.

4/ Associated Press v. U.S., 236 U.S. 1, 20 (1945) (the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.") See also FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

enforcement has been suspended. The national caps, one to a market, duopoly and cross-interest rules are on the ropes. To climb out of its diversity cave, the Commission should try every tool it finds.

Congress expects the Commission to consider diversity in all aspects of broadcast regulation.[5/] Thus, the Commission has long tied diversity to such basic licensing considerations as application processing. In its Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) ("Minority Ownership Policy Statement"), the Commission promised that tax certificate and distress sale applications "can be expected to receive expeditious processing." While it is unclear to some whether "expeditious processing" could still be part of a race-conscious program, race-neutral expeditious processing surely can be used to promote diversity.[6/]

The Commission routinely conditions broadcast sales on divestitures.[7/] Anticipating this, applicants routinely propose spinoffs, and the Commission often considers these proposals when it

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5/ See p. 13 n. 22 infra. See also Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) (diversity must be considered even in discretionary engineering decisions.)

6/ Unfortunately, processing order has sometimes been used to defeat diversity goals. For example, applicants passing the tedious and arbitrary FM "hard look" criteria were considered together at the top of the processing line, while those who failed the "hard look" test had to re-file their applications for consideration at the end of the processing line. See Processing of FM and TV Broadcast Applications, Report & Order, 50 FR 19,936, 19,940 (1985). Owing to their relative lack of resources, SDBs were more frequently victimized by the "hard look" regime. Thus, ironically, the "hard look" procedure's use of the processing line as a qualifications queue had the effect of inhibiting diversity.

7/ See, e.g., Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994). In addition, the distress sale policy, which is still in effect, operates by requiring an applicant in hearing to divest the stations subject to the hearing in order to promote diversity. Minority Ownership Policy Statement, 68 FCC2d at 983.

evaluates whether a major transaction would serve the public interest.[8/] That is only natural, as spinoffs are a routine business consideration in structuring broadcast transactions. While a spinoff proposal might not typically be germane to an applicant's basic qualifications, it could be a reasonable comparative factor. A spinoff has at least as much public interest impact as some of the traditional comparative licensing factors.[9/] Indeed, spinoffs have long been central to the Commission's comparative jurisprudence.[10/]

8/ For 20 years, merger applicants have voluntarily included spinoff proposals in their applications. See, e.g., Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd 5012, 5036 ¶47 (1996) (approving the CBS/Infinity Broadcasting Merger, and weighing favorably as part of CBS' showing in support of a one-to-a-market rule waiver that it "has already filed an application to assign one of the stations it will divest to a minority-controlled entity"); Viacom, Inc., 9 FCC Rcd at 1579 ¶9 (approving the Viacom/Paramount merger, and holding that Viacom's proposal to seek ou minority buyers for two radio stations "would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver); Combined Communications Corp., 72 FCC2d 637, 45 RR2d 1387, 1401 ¶45 (1979) (approving the Gannett/Combined Communications Corp. merger, and declaring that the opportunity to approve the spinoff of WHEC-TV, Rochester, New York to a minority owned company "represents a most significant step in the implementation of our continuing effort to encourage minority ownership of broadcast properties.") In none of these cases did the Commission hold that the spinoffs were a necessary condition to its ultimate public interest finding, but it did take the spinoffs into consideration in rendering those findings and, e.g., granting waivers.

9/ In Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), the court rejected the Commission's long-held assumption that owner-operators generally provide better service than absentee owners who hire experienced managers. Howeer, Bechtel did not hold that such factors as auxiliary power, broadcast experience and past broadcast record lacked a regulatory basis. Spinoffs are at least as valuable to the public interest these factors. See Policy Statement on Comparative Hearings, 1 FCC2d 393 (1965) ("1965 Policy Statement").

10/ For example, incumbent licensees applying for new facilities were permitted to propose divestitures so that they could present attractive diversification proposals. Washington's Christian Television Outreach, Inc., 59 RR2d 787, 790 (1984), recon. denied, 59 RR2d 1679 (1986), aff'd by judgment, No. 85-1649 (D.C. Cir., Dec. 17, 1987).

Several diversity-promoting criteria theoretically could be used as the basis for a system of processing order ranking; e.g. EEO performance, nonentertainment program offerings or access time for political candidates. But a processing order ranking paradigm can only have a single criterion; otherwise, disappointed applicants would tie up the transactions in court by claiming that notwithstanding the winner's superiority on one factor, they were really superior on the other factors. Since there can be only one criterion, it should be spinoffs promoting ownership diversity. As Congress has stated,

> it is upon ownership that public policy places primary reliance with respect to diversification of content and that historically has proved significantly influential with respect to editorial comment and presentation of news.

Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765, at 26 (citing TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973).

A processing order ranking paradigm benefitting SDBs would implement Congress' expectation that all federal agencies help these businesses secure growth opportunities and obtain access to capital. In adopting the Small Business Economic Policy Act of 1990, 15 U.S.C. §631(a) and (b) (1994) Congress declared that

> it is the continuing policy and responsibility of the Federal Government to...foster the economic interests of small businesses; insure a competititive economic climate conductive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businessses.

> Congress further declares that the Federal Government is committed to a policy of utilizing all reasonable means...to establish private sector incentives that will help assure that adequate capital at competitive prices is avaiulable to small businesses. To fulfill this policy, departments, agencies, and instrumentalities of the Federal Government shall use all reasonable means to coordinate, create, and sustain policies and programs which promote investment in small businesses.... (emphasis supplied).

It should not be difficult to design a processing order paradigm that promotes ownership diversity. This task is not a one-day excursion, but it is not insoluable by an agency accustomed to resolving the most stupefying cerebral issues of telephone rate regulation and broadcast engineering.11/

Too much is at stake to miss this opportunity to promote diversity in a big way. By putting its best minds to work quickly, the Commission can cause millions of dollars in broadcast assets to become available to socially and economically disadvantaged small businesses. History should record that the Commission seized this opportunity to promote diversity, rejecting the notion that it was "too complicated" to design a procedure that helps these deserving businesses.

II. Definitions Of Terms

As set out below, these definitions are used:

1. An "SDB" is a socially and economically disadvantaged small business concern. The term is defined in the SBA's governing

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11/ Far more complex comparative paradigms than this one have been used before; see, e.g., 1965 Policy Statement. The Commission recently decided to use a point system to allocate ITFS licenses. ITFS Processing Issues, 11 FCC Rcd 12,380 (1996). It also recently proposed, as an alternative to lotteries, a three-factor point system to allocate noncommercial licenses. Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 13 FCC Rcd 21,167, 21,177-78 ¶21 (1998).

statute.[12]

2. A "market" is a TV DMA or daisy chain of contiguous DMAs.

3. A "current application" is the transfer or assignment application which has been filed on the same day as another application in the same market, and which cannot be granted if the other application is granted.

4. A "current applicant" is the Form 314 assignor or Form 315 transferee of a current application.

5. An "M/X" group consists of all mutually exclusive current applications in a market.

6. A "bump-up" is consideration of the current application before other mutually exclusive current applications that lack a bump-up.

7. A "spinoff application" is a transfer or assignment application, or a station financing,[13] that is proposed in the current application.

8. A "spinoff" is selling, causing another party to sell, or financing the sale, to an SDB, of a full power analog television station, or digital channel (to the extent that the rights to such a channel can be sold), provided that the spinoff station is (a) in the top 50 markets, or (b) in a market whose number of TV households is no less than half the number of TV households of the market for which the bump-up is sought.

12/ See 15 U.S.C. §631(a)(4)(A) (1999). However, the FCC would need to define "small" in a manner that realistically reflects the size of a television broadcaster. A "small" television broadcaster might be one that possesses no more than a certain number of television stations, or that has an asset value below a set figure.

13/ See p. 10 and n. 16 infra (advantages of financing); p. 17 n. 27 (need for financing).

III. MMTC Proposes A Straightforward Diversity Bump-Up

MMTC proposes that processing order ties be broken according to whether one or more current applicants proposes to spin off one or more full power television stations to small, disadvantaged businesses. Our proposal's features are described below.

Nature And Weight Of The Incentive. Current applicants proposing a spinoff would receive a bump-up. There would be only one weight of bump-up, irrespective of which stations, or how many stations, are to be spun off. Thus, whether a bump-up is awarded would be a simple, binary decision.14/

Selection Among Equivalent Proposals. If more than one bump-up is awarded in a market, the first-in-line current applicant would be chosen through a neutral selection process among only the bumped-up current applicants. If the current applicant thus selected does not close its transaction, the current applicant that came in second would be considered.

14/ No one should be heard to argue that a proposal to spinoff two stations is necessarily superior to a proposal to spin off one, or that a proposal to spinoff a station in a very large market is superior to a proposal to spin off a station in a smaller market. Applicants' relative diversity benefits are difficult to predict, quantity or rank. Sometimes a single small transaction profoundly advances diversity. For example, the acquisition of WLBT-TV, Jackson, Mississippi (the 89th market) in 1980 by a small, disadvantaged new entrant profoundly changed the racial and social climate in a city torn by generations of hatred and hostility. Yet the sale of a television station in New York City to an SDB that devotes most of the station's airtime to home shopping might have only a modest impact on diversity. Nonetheless, each of these proposals is obviously superior to a proposal to effect no spinoffs. Giving both of these proposals a bump-up as against other current applicants' proposals is far better than relegating them to the vagaries of astrology or courier speed.

Neutral Paradigm For Equivalent Proposals. Ties unable to be broken by bump-ups should be broken according to who was first to contract. This criterion would neither promote nor inhibit diversity, but unlike lotteries and first-come, it has a rational basis tied to business reality. It correlates, albeit modestly, with applicants' intensity of interest and to the time and care taken by the current applicant to fashion its application.15/

Time Allowed for Spinoffs. The spinoff application would have to be filed three years from the date the current application's sale closes. If the channel being sold is a digital one, this three-year period would begin on the later of the date the current application's sale closes or the date the digital channel signs onto the air.

Test For Performance Of A Spinoff Commitment. To avoid genuine hardship, "best efforts" would be the test for performance of a spinoff commitment. Thus, in the rare instance in which no SDB will purchase the spinoff station except at a price far below fair market value, the seller could request leave to extend its commitment another year. It could use this time to attempt to sell a different station, to widen its recruitment pool of potential SDB purchasers, or to help an SDB obtain better financing for the purchase. Some flexibility should also be afforded to current applicants who, despite their best efforts, were unable reasonably

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15/ An LMA's escrowed contract or option, perhaps dating back years, should not count as a "contract" for this purpose. The Commission should not reward LMA operators for jumping the gun on duopoly rules to the disadvantage of single-station operators. The Commission has not found that TV LMAs generally serve the public interest. Thus, in managing the processing queue, it should ensure that LMA operators are treated no more favorably than other current applicants.

to identify the station they could spin off until close to the expiration of the three year spinoff period. These current applicants should be permitted to seek additional time and avoid a fire sale.

Who May Own A Spinoff Station Before It Is Spun Off. The spinoff station would not need to be owned by the current applicant presently. It could be acquired and re-sold later, or it could be financed by the current applicant if such financing is permitted by the attribution rules.16/

When The Spinoff Station Must Be Identified. Since the spinoff station need not be owned by the current applicant presently, its identity may be unknown to the current applicant when it files the current application. As long as the current applicant makes its spinoff proposal in good faith, it would not be required to identify the spinoff station until a reasonable time before the three year spinoff period is due to expire.

Treatment Of Multi-City Applicants. If a current applicant files several applications in several markets, its proposal would be weighed in each market against any mutually exclusive current applicants in that market. Thus, a company buying three stations, and proposing a spinoff, would receive a bump-up in each market.

16/ This would prevent a situation in which a company wishes to bring about the sale of a station to an SDB, but is prevented by the multiple ownership rules from buying the station itself for resale to the SDB. By allowing financing rather than a sale, the Commission could avoid this anomalous and ironic result. Proposals to provide financing should be viewed favorably, given SDBs' endemic difficulty in securing capital. See p. 17 n. 27 infra.

That spinoff would have to be performed if any one of its three sales closes.17/

Amendments To Applications. Within 30 days after all current applications in an M/X group are accepted for filing, a current applicant not originally proposing a spinoff could propose one. However, any request at any time to delete a spinoff proposal would be treated as a major amendment. In this way, current applicants would not be expected to make a spinoff proposal in a vacuum, but they would also be prevented from conspiring to defeat the purpose of the rule.

Proposals Contingent On Existence Of M/X Competitors. A spinoff proposal could be made contingent on whether another current application in the same market was filed on the same day and was subsequently accepted for filing.18/ However, a current applicant could not seek to be relieved of a spinoff proposal if it removes a mutual exclusivity by providing money, or other consideration,19/ to

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17/ It would be unfair to encumber a complex transaction with spinoffs that are variously tied to each of several M/X markets. Moreover, requiring market-by-market spinoff proposals would more likely motivate multi-city applicants to propose smaller city spinoffs.

18/ The integrity of the incentive plan must rest on the expectation that it is a "win-win" -- that is, the applicant proposing the spinoff would receive an otherwise unavailable benefit (the bump-up) in return. Thus, the Commission would overreach if it created a regime in which an applicant would be compelled to perform its spinoff even if there were no mutual exclusivity.

19/ For example, current applicants, each M/X'ed in two cities, might agree that they would each withdraw one of their applications, with no cash changing hands. This would constitute "consideration" and could not be used to defeat the purpose of the proposed rule.

a mutually exclusive current applicant in exchange for the dismissal of its application.20/

Proposals Contingent On Outcome Of Competitive Selection Process. A spinoff proposal could be contingent on the closing of the transaction(s) contemplated by the current application, but not on whether the current applicant secures an exclusive bump-up or whether it wins the race to the courthouse through other means (e.g. a lottery among the bumped-up current applicants, or the withdrawal, dismissal, or denial of a competitor's current application.) Thus if a current applicant cannot close its transaction within the allowable 90-day period after finality on its grant, it would be relieved of the spinoff proposal. However, if it closes its transaction, it would be expected to honor its spinoff proposal. Thus, if several M/X current applicants each propose spinoffs, at least one of the spinoffs will likely take place, and the public will receive a diversity benefit.

Prevention of Abuse. To prevent gamesmanship and promote broadcasting by independent voices, the buyer of the spinoff station would be subject to a three year holding period,21/ and LMAs would be prohibited.

IV. MMTC's Diversity Bump-Up Proposal Meets All Tests For Sound Regulation

MMTC's proposal meets all of the well-established criteria for sound broadcast regulation.

20/ In the past, applicants for new facilities who bought out their mutually exclusive competitors were routinely permitted to reneg on their proposals for integration and for diversification-promoting divestitures. This policy was a mistake because it inhibited the relative ability of new (often minority) and owner-operated (usually small business) companies to be the surviving applicants in universal settlements.

First, it is constitutional and consistent with Congress' reading of the statute. It is race-neutral,[21] and it advances the diversity goals of the Act by fostering ownership by minorities and other underrepresented groups.[22] Furthermore, MMTC's straightforward test can be implemented easily irrespective of

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21/ The SBA has issued new rules that conform its eligibility and contractual assistance requirements to Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals (Final Rule), 63 FR 35726 (June 30, 1998). This SBA rule provides a race-neutral model which the Commission can import into its own rules.

22/ In 1982, Congress determined that "an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765, at 26. Later, in 1993, Congress adopted Section 309(i)(A)(3), which provided that "for each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall include safeguards to protect the public interest in use of the spectrum by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including...business owned by members of minority groups, and women." In 1997, when Congress repealed Section 309(i)(A)(3) in favor of auctions, Congress again reiterated that minority ownership was an important objective in fostering minority telecom ownership. See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services). See also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 11 FCC Rcd 6280 (1996) (implementing Section 257 of the Act, which directs the Commission to promote the policies and purposes of the act favoring diversity of media voices, vigorous economic competition and technological advancement.)

whether or not Ashbacker applies to races to the courthouse.[23]

Second, MMTC's proposal is easily understood. Only one criterion would be used -- station spinoffs -- and everyone understands the concept of a "spinoff." Thus, no one could be heard to argue that her superiority on one criterion outweighs another current applicant's superiority on another criterion. Furthermore, the criterion to be used is not only objective and quantifiable, it is binary. One either spins off a station and thus gets a bump-up, or one does not. No simpler test can be developed, even in theory. No one could claim that she acted to her detriment because the rule was too vague.[24]

Third, MMTC's proposal would avoid time-consuming litigation over whose application really was more pro-diversity. Our proposal

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23/ Some might contend that comparative hearings are required to resolve race-to-the-courthouse ties because such applications are mutually exclusive within the meaning of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). MMTC takes no position on this question. But even if comparative hearings are required, our proposal would afford the comparative applicants the process they are due. The D.C. Circuit has held that that Section 556(d) of the APA "expressly authorizes 'paper hearings' in licensing cases when a party will not be prejudiced by that procedure." Cellular Mobile Systems of Pennsylvania, Inc. v. FCC, 782 F.2d 182, 198 (D.C. Cir. 1985). A simple paper hearing among M/X'ed current applicants (e.g., where the only issue is which applicants proposed spinoffs) would prejudice no party, since no one has a firmly rooted expectation that her application considered will be considered in any particular order. See Metro Broadcasting, Inc. v. FCC, 497 U.S. at 547, 597-598 (1990) ("[a]pplicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership....") Thus, if Ashbacker applies, a diversity-promoting paradigm could be implemented in the form of a simple paper hearing.

24/ See, e.g., Glaser v. FCC, 20 F.3d 1184 (D.C. Cir. 1994) (reversing denial of renewal application where Commission did not give adequate notice that it would apply its "hard look" policy to compaative renewal proceeedings); Radio Athens, Inc. v. FCC, 401 F.2d 398 (D.C. Cir. 1968) (reversing dismissal of application where rules did not clearly define the required content of the application).

rewards only those applicants that unquestionably propose more diversity than their competitors: those who propose a spinoff would be favored over those who don't. The Commission would never have to render inexact, hypothetical, apples-and-oranges evaluations of whether one spinoff proposal is superior to another. Having determined that a glass containing water is better than an empty glass, the Commission would never be drawn into a contest over whether a gallon is better than a quart.[25/]

Fourth, MMTC's proposal neither favors, nor takes into account, the relative sizes of current applicants. In this respect, it resembles the tax certificate policy, which incentivized broadcasters for what they did, irrespective of who they were or what else they owned. Our proposal looks toward what current applicants can do to promote diversity, not who they are. A broadcaster can do little about its size between today and November 16. But it can make a contribution toward solving the diversity dilemma by proposing to spin off stations to new entrants. In any event, if a company is large enough to buy a television station in a market large enough to draw competition to create

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25/ MMTC's plan would provide more security from appellate litigation than the plan contained in the Public Notice. By its terms, Section 309(i)(5)(A) of the Act disallows the use of random selection to issue licenses after July 1, 1997. A transferee or assignee is in fact "issued" a license once its application is granted. On this basis, a decision to use random selection would certainly be appealed. MMTC takes no position on this question, but submits that an appeal of a decision to adopt MTMC's plan could only be based on the theory that the Commission could not rationally determine that spinoffs to SDBs promote diversity. The Courts would almost surely defer to the Commission's expertise and discretion in holding that a spinoff to an SDB benefits the public more than the absence of one. See Rainbow Broadcasting v. FCC, 949 F.2d 405, 410 (D.C. Cir. 1991) (recognizing that the Supreme Court has held that "Congress delegated to the FCC the task of making the initial determination of how its policies may best serve the public.")

duopolies, the company is large enough to be able to spin off or finance a station in the next three years. Thus, our proposal would confer no relative benefit on a current applicant because of its size.26/

Fifth, MMTC's proposal would discourage gamesmanship, and ensure broadcasting by independent voices, by imposing a three year holding period on the spinoff stations, and by barring LMAs. The new attribution rules further reduce the likelihood of gamesmanship.

Sixth, MMTC's proposal is enforceable. The occurrence of television spinoffs is easy to monitor and observe. A simple calendar in the Bureau should suffice.

Seventh, MMTC's proposal is flexible enough to avoid genuine hardship. By allowing three years for a spinoff, and allowing current applicants wide discretion in how and when to choose the

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26/ Our proposal does not attempt to impute a higher diversity value based on how many stations are spun off. See p. 8 supra. Thus, a single spinoff, proposed in conjunction with the purchase of multiple stations, would be treated the same as a spinoff proposed in conjunction with the purchase of one station. This does not relatively benefit multi-city current applicants, but it does incentivize them more strongly than other current applicants. A multi-city current applicant would be well advised to propose a spinoff if it wishes to have a good chance to win several of its races to the courthouse. That spinoff would be locked in if any one of the multi-city current applicant's sales closes.

spinoff station, no current applicant would have to accept a fire sale price for its spinoff.27/ Our proposal would also avoid hardship by using a best efforts test for compliance. See p. 9 supra.

Eighth, MMTC's proposal would be a powerful engine for diversity. Not all races to the courthouse could be decided by our proposed rule. Sometimes, no one will propose a diversity bump-up. However, for most M/X situations, the public is likely to witness a sale to an SDB that would otherwise have been unlikely to occur. These spinoffs, like most spinoffs over the past twenty years, would be among the best stations that SDBs would have an opportunity to purchase.

Thus, the benefits of the proposal would be very substantial. Such a regulation is well worth having on the books.

27/ This three year period would also afford SDBs ample time to raise the necessary capital for the acquisition. Access to capital has long been a critical need of SDBs, particularly minorities. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982). In MMTC's experience as (inter alia) the nation's only full service broadcast broker specializing in sales to minorities, SDBs often need more time than other applicants to raise the same amount of capital. It is well documented that minorities often experience artificial barriers to obtaining credit or financing for communications ventures. See, e.g., Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Department of Commerce, Capital Formation and Investment in Minority Enterprises in the Telecommunications Industries, Executive Summary (1995) (<http://www.ntia.doc.gov/opadhome/mtdpweb/finover.htm>); see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 5th Report and Order, 9 FCC Rcd 5532, 5573-5574 ¶98 (1994) (Black and Hispanic applicants were 60% more likely to be turned down for loans than similarly situated white applicants, and held to higher standards to qualify for loans).

Conclusion

Given the shortness of time, we have not attempted to address all of the ministerial details of implementation of our plan. However, there is enough time before November 16 to work out those details. We invite the industry's support and its suggestions on how our plan could be improved. We encourage the Commission to call together the commenting parties to think through how such a plan could be designed in the most logical and efficient way.

Respectfully submitted,

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